

TESTIMONY OF
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Thank you chairman Oxley and members of the Subcommittee for the opportunity to testify today on Superfund Reauthorization. I am the Director of the Ohio Environmental Protection Agency, I am pleased to be here today to share my views on fixing Superfund.

Superfund reauthorization was a priority for Ohio during the 104th Congress. I think we all agree that Superfund is broken and is in need of legislative reform during this Congress.

Even USEPA has implemented "administrative reforms" to address Superfund's problems. However, I believe the success of these reforms cannot yet be judged because of the infancy of the program. Further, I am not certain that any reform outside a legislative change will stand the test of time and truly fix the problems.

To illustrate my concern consider the TRW site in Ohio. TRW completed a cleanup under Ohio's

enforcement program in 1986. In 1989, USEPA added the site to the NPL even though TRW implemented the remedy. USEPA listed the site because of a bureaucratic policy that promoted listing every site scoring above 28.5 regardless of whether a cleanup occurred. Today, USEPA would not list a remediated site. Instead, USEPA would seek agreement from the State prior to listing. However, nothing in the law prevents USEPA **from** changing their policy and listing other clean sites in Ohio.

In fact, USEPA is changing their listing policy again. They recently released a memo announcing that they will seek agreement for NPL listings **from** the state environmental agency rather than the Governor, which had been the policy for several years. Without incorporating good practices and policies into **statute**, USEPA is **free** to change them at their whim. Relying on USEPA's current policy or practice to cure **Superfund** does not guarantee a permanent solution. Moreover, stretching application of the current law beyond its intended boundaries will certainly lead stakeholders into court and **only** result in more money spent on non-cleanup activity. I urge you to continue working with states and other stakeholders to put real and permanent solutions for **Superfund** into law.

Superfund reauthorization remains an important issue for Ohio. Ohio has a successful cleanup program that consists of voluntary and enforcement measures. Both the federal **Superfund program** and Ohio's cleanup programs remediate contaminated sites in Ohio. Amendments to CERCLA at the federal level will directly **affect** the thirty-four NPL Superfund sites in Ohio and indirectly affect the thousands of other contaminated sites which are more likely to be addressed by our **cleanup** programs. Therefore, changes to CERCLA could improve the effectiveness of our state programs

or could hinder them if they are not carefully crafted. Today, I will focus my remarks on changes to Superfund that would create an effective and efficient state role and protect and benefit Ohio's cleanup programs.

STATE ROLE

CERCLA SHOULD AUTHORIZE OR DELEGATE STATES TO OVERSEE CLEANUPS

Last Congress, Ohio EPA strongly encouraged Congress to amend CERCLA to give the states the option to run the **Superfund** program through authorization--whereby a state would use its own **laws** to oversee Superfund cleanup--or through delegation--whereby states would use federal law. The authority to implement the Super-fund program would give Ohio EPA more flexibility to tailor the **Superfund** cleanup program to address Ohio's contaminated sites, maximize the efficiency of the cleanup programs, provide a legal release for completed cleanups and eliminate the duplicative oversight by both the federal and state governments at Ohio's contaminated sites. This Congress we urge you to provide the state both delegation and authorization options to oversee cleanups.

I have over twenty-two years of experience at the State and Federal level administering environmental laws and regulations. My work provided me with ample opportunities to experience **first** hand many different federal and state relationships. Some relationships worked better than others at effectively and efficiently protecting the environment. Superfund's efficiency **suffers** from the current overlapping statutory roles for the federal and state governments. Super-fund is one of

the only environmental programs without an opportunity for the state to be delegated or authorized to **manage** the environmental work. At the same time, States are leaders in developing innovative voluntary programs that effectively cleanup the sites Superfund **left** behind. The dual oversight does not contribute to better environmental protection and simply wastes resources.

This shared responsibility for the Superfund program is also a target of criticism because it creates disagreements between the state and federal government. For example, at the New Lyme site in Ashtabula County, Ohio, we paid about \$2 million (10% for the total) for the Capital cost of the remedy and are statutorily responsible for at a minimum **\$750,000** per year (100% of the total) for the operation and **maintenance** of the remedy. As a result of the amount of state money at stake, Ohio EPA exercised its legal right under CERCLA to fully review the technical work performed by the federal government's consultant. Our review was in addition to **USEPA's** full review of the technical work. This example illustrates how the dual oversight roles put the governments at odds and unnecessarily create conflict that diverts resources away **from** cleanup. Providing the states **with** the options to over see the cleanups will eliminate the current duplicative roles.

A PERFORMANCE RATHER THAN A PROCESS BASED SYSTEM

Any approval process for a state to be delegated or authorized should be **performance-based** rather than process-oriented and involve as little **administrative** burden **as** possible. I grow **increasingly** concerned about the program the states would inherit as a result of Superfund reform. Ohio EPA will evaluate very carefully the relationship you establish between states and **USEPA** before agreeing

to accept a delegated or authorized program. In order for the states to effectively incorporate the Superfund sites into our state system, we would need to be satisfied that the federal government would not be dictating the administrative process states choose to achieve protective cleanups. **The** law must be **crafted** to prevent **USEPA from** forcing states to be preoccupied with form over substance.

An example of a bad state and federal relationship occurred in Pennsylvania with their air program. USEPA leaked a draft Inspector General's Report unfairly criticizing Pennsylvania for failing to report an air violation as "significant." Pennsylvania reported the violation, but disagreed with USEPA about the need to label the violation as "significant." Pennsylvania had debated the issue with USEPA for ten years arguing **that** the rigid set of enforcement **procedures** triggered by the **label** did nothing to help return the violation to compliance or help protect the environment. USEPA expended resources and inspected a state government over the proper use of a label. The Clean Air Act provides **USEPA enough** authority to interfere with Pennsylvania's air program over the proper use of a label. Do not provide the federal government with a similar process oriented role in Superfund that could allow **USEPA** to force states to place more importance on the form rather than the substance of a cleanup. States must be given the latitude to determine **the** best process to achieve the federal environmental statutory goals.

MODIFY THE STATE COST **SHARE**

The state cost share should be limited to 10% of both capital and operation and maintenance (O&M)

costs so that the state and federal government have a shared interest in managing both capital and operation costs of the remedies. The current cost share requirements put the federal and state governments at odds over remedy selection. Because the state pays 100% of **O&M** costs and the federal government pays none, the federal government is typically interested in choosing a remedy that shifts costs to the states.

The New Lyme site previously mentioned exemplifies this problem. **USEPA** and **OEPA** argued about the completeness of the remedy. **OEPA** maintained ~~that~~ the remedy was not functioning properly and needed modifications before it should progress to the O&M stage. If the state is correct and the remedy is not working properly, the state will be forced to pay for the corrections to it as part of O&M. The cost share requirements do not require **USEPA** to contribute money to any corrections, even though the remedy is not working properly. **CERCLA** should not be constructed so as to foist a federally created responsibility onto the states.

STATE APPLICABLE LAWS SHOULD APPLY TO CERCLA CLEANUPS

States should be able to apply their own environmental requirements to **Superfund** remedies to accommodate the state's specific environmental conditions. Many states have applicable cleanup requirements based upon that state's environment and public concern. States, including Ohio, also have applicable environmental requirements that apply to pollution that is relocated as a result of the cleanup.

For example, the Pristine, Inc. **Superfund** Site (Site) is a former liquid waste disposal facility located in Reading, Ohio. Part of the remedy for the Site involves the design and construction of a treatment plant for the in-situ vapor extraction system and **groundwater**. OEPA developed proposed National Pollution Discharge Elimination System (**NPDES**) effluent limits for the **treated groundwater** prior to discharge to Mill Creek. U.S. EPA raised objections to **the** proposed effluent limits, and would not agree to use the variance procedure that exists in Ohio's antidegradation regulations that allows for the adjustment of effluent limits in certain circumstances. Instead, US. EPA waived **OEPA's** anti-degradation requirements as allowed by CERCLA. The effect of this waiver and the resulting increased effluent limits at the Pristine Site is that other industries discharging to Mill Creek may have their effluent limits adjusted downward to take into account the effluent limits designated for the Pristine facility. CERCLA should not preempt these state environmental requirements.

STATE VOLUNTARY CLEANUP PROGRAMS

We also are concerned about the role a reauthorized Superfund would give to the federal government for voluntary cleanups. States clearly have been the innovators in developing voluntary cleanup programs. Ohio enacted a voluntary cleanup law in 1994 that provides minimal government oversight to volunteers who are willing to perform cleanups. Our program is successful. We issued 7 covenants for completed cleanups in the first two years alone. The Kessler Products facility, near Canton, estimated that if their site was cleaned under CERCLA the cost would have approached **\$2** million and the work was expected to last 3 to **5** years. Under Ohio's voluntary program, the **cost** was \$600,000 and the cleanup took 6 months to complete. Kessler Products was Ohio's **first**

voluntary cleanup. We do not want any changes to Superfund that would result in our efficient voluntary program becoming more like the federal program. I am extremely concerned that any statutory role for the federal government in Ohio's program would threaten the program's success.

Ohio and many other states have voluntary cleanup programs already in operation. A wealth of experience exists within the states that represents a wide diversity of experience. Any amendments to CERCLA regarding state voluntary cleanup programs must recognize the diversity throughout the country. State governed and financed voluntary cleanup programs, designed with particular attention to efficiency and effectiveness, have existed for a number of years. These programs are tailored to the needs of the particular state and, therefore, programs vary from state-to-state. It is essential that CERCLA endorsement of state voluntary programs recognizes diversity throughout the country and allows voluntary programs to be managed at the state level.

Since we promote our voluntary program as the primary program to address contaminated sites in Ohio, we are especially interested in encouraging you to consider CERCLA amendments which would enhance our voluntary program. Changes to CERCLA are necessary to fully maximize the benefits of our voluntary program in Ohio. These changes include modifying the remedy selection process, providing a legal release to volunteers, providing an exemption from RCRA for on-site contaminated soil management and ensuring that Superfund reform is comprehensive.

FEDERAL RELEASE OF LIABILITY FOR A STATE CLEANUP

Ohio's volunteers can eliminate their state liability by completing a cleanup under Ohio's voluntary program, however their property is still subject to CERCLA liability. Under **this** cloud of federal liability many potential volunteers will chose not to utilize Ohio's program. Thus, fewer cleanups will occur and existing contamination will continue to migrate, proliferating the problem for future generations. Alternatively, government resources, through public funding of the cleanup or through enforcement proceedings and oversight, may be used to address these problems. However, those who choose to clean a site under Ohio's voluntary cleanup program will still face the uncertainty of CERCLA liability which will negatively affect the marketability and value of a property.

To provide volunteers with incentives and achieve Ohio's goal of maximizing cleanups under its voluntary program, release **from** CERCLA liability at completion of the voluntary cleanup process is necessary. CERCLA should provide this legal release by operation of law without any **USEPA** review or approval. This will ensure that the diversity of state programs will be accommodated.

CLARIFY THE REMEDY SELECTION PROCESS

Critics argue that the U.S. EPA's risk assessments contain extreme assumptions of future use that may never occur. If residential use of a site is not a reasonable assumption, then the cost of a risk assessment for that future use is economically wasteful. Persuaded by these arguments, Ohio EPA developed rules that determine how clean voluntary sites must become. Our program uses realistic

assumptions about risk exposures and factors existing or planned future land use into the remedy selection decision. As Kessler Products discovered, this saves significant cleanup dollars.

The CERCLA statute and rules prescribing what is an appropriate remedy for a site are unclear, conflicting, and subjective. At **this** time, CERCLA does not contain clear guidance for balancing **cost** and permanence. The remedy selection process should be clarified and streamlined to cease U.S. EPA's site-by-site interpretation of the statute. Many proposals for revamping **CERCLA's** remedy selection process exist. Ohio supports alternatives that **include** elimination of the preference for permanence, enhancing the use of presumptive remedies and integrating realistic **future** land uses into the remedy selection process.

Changes to the remedy selection criteria would ensure, on a practical level, that remediation completed under our voluntary program is within the definition of "protective levels" under the federal program. If **CERCLA's** remedy selection criteria results in cleanups that are too disparate from Ohio's, we may consider revisiting our **rules**. Furthermore, changing remedy selection will decrease the costs of cleanups.

RELAX RCRA REQUIREMENTS FOR ON-SITE CONTAMINATED SOIL MANAGEMENT

At some voluntary sites, on-site management of **contaminated** soil **triggers** the application of **RCRA** management requirements. While volunteers should use best management practices and comply

with RCRA for off-site management of soil, meeting RCRA requirements on-site only serves to increase costs without providing any commensurate benefits to the cleanup. This exemption would benefit volunteers through allowing them to devote more resources to cleanup.

COMPREHENSIVE **REFORM**

As detailed in my remarks, many changes in **Superfund** would benefit Ohio's volunteers and assure more consistency between state and federal enforcement programs. Piecemeal Superfund legislation would not provide **all** of the benefits of a comprehensive reauthorization bill. Federal seed money for revolving loan funds tied **with** process oriented criteria for approval of state voluntary **programs** will not help Ohio's program or the volunteers who are **willing** to cleanup sites. CERCLA could provide significant incentives for volunteers through responsible and realistic remedy selection reforms, a RCRA exemption for on-site soil management and providing a legal release of CERCLA liability for completed cleanups.

in closing, Ohio is very interested in seeing changes to CERCLA that **will** compliment and improve Ohio's cleanup programs but not if participation **costs** include changing our program to look and be just like the federal program. Thank you again for this opportunity to present Ohio's position on CERCLA reauthorization.